



INTERIOR BOARD OF INDIAN APPEALS

W.J.B. Graham and William S. Graham v. Billings Area Director, Bureau of Indian Affairs

4 IBIA 205 (11/19/1975)

Also published at 82 Interior Decisions 568



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ADMINISTRATIVE APPEAL OF
W.J.B. GRAHAM AND WILLIAM S. GRAHAM

v.

AREA DIRECTOR, B.I.A., BILLINGS,
AND ALL OTHER INTERESTED PARTIES

IBIA 74-43-A

Decided November 19, 1975

Appeal from the decision of the Area Director, affirming the decision of the Superintendent, Crow Agency, Hardin, Montana, canceling certain leases involving allotted lands on the Crow Reservation, Montana.

Affirmed.

1. Indian Lands: Leases and Permits: Farming and Grazing

The restricted allotment of any Indian may be leased for farming or grazing purposes by the allottee or his heirs, subject to the approval of the superintendent or other

officer in charge of the reservation where the land is located, under such rules and regulations as the Secretary of the Interior may prescribe.

2. Indian Lands: Leases and Permits: Subleases, Assignments, Amendments, Encumbrances

A sublease, assignment, amendment or encumbrance of any lease may be made only with the approval of the Secretary and the written consent of all parties to such lease.

APPEARANCES: Bert W. Kronmiller, Esq., and James E. Seykora, Esq., counsel, for appellants, W. J. B. Graham and William S. Graham; Crowley, Kilbourne, Haughey, Hanson & Gallagher by John Dietrich, Esq., for Gary Murphy, Administrator of the Estate of Maurice D. Murphy, Deceased; Edward L. Meredith, Esq., Field Solicitor's Office, Billings, Montana, for Superintendent, Crow Indian Agency and Area Director, Billings Area Office, Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

This matter comes before the Board on an appeal from a decision of the Acting Area Director, Billings, Montana, dated April 2, 1974,

affirming the decision of the Acting Superintendent, Crow Agency, Hardin, Montana, dated January 28, 1974, canceling certain leases (Contract Nos. 0-115, 0-116, 0-347, and 0-368) involving allotted lands on the Crow Reservation, Montana.

The matter was referred to Administrative Law Judge Frances C. Elge for a fact-finding hearing and recommended decision. A hearing was held at the Crow Agency, Montana, April 3 and May 21, 1975. The essential facts of the case are recited in the findings and recommended decision dated October 28, 1975.

The Administrative Law Judge found among other things that:

1. A sublease, assignment, amendment, or encumbrance of any of the leases may be made only with the approval of the Secretary of the Interior and the written consent of all parties to such lease as provided in 25 CFR 131.12(a).

2. The appellants entered into a contract for a deed on July 10, 1973, with Lalon Fladager and Daryl Fladager, as purchasers; that on the next day, July 11, 1973, the Fladagers by an agreement assigned their interests in and to said contract for deed to Maurice D. Murphy. The leases in question were a part of the consideration for the purchase price set forth in the contract for deed.

3. Maurice D. Murphy first delivered livestock to the ranch premises, including the land covered by the aforementioned leases, on or about November 1, 1973.

4. Varying numbers of payments in varying amounts were accepted from the Maurice D. Murphy lease account by members of the Lefthand family.

The contention that the lessors acquiesced in the assignment of the leases by the acceptance of cash cannot be sustained. The acceptance of rentals by a lessor subsequent to default on specific provisions of a lease by a lessee does not constitute a waiver of items in default in the absence of a showing that the lessor voluntarily or intentionally waived the requirements under the lease. Sessions, Inc. v. Richard Amado Miguel (Lessor), 4 IBIA 84, 82 I.D. 331 (1975).

5. Custom and usage on the Crow Reservation for many years has been the practice. "that insofar as office leases are concerned there are numerous Indian lessors, heirship problems involved * * * the purchaser simply continues to make payments under leases and to demonstrate that the consent of the Indians is in fact given by such acceptance."

[1] & [2] The unauthorized practice does not validate the assignments for the reason that no Agency practice can abrogate Acts of Congress and regulations of the Secretary of the Interior promulgated under those Acts. See 24 U.S.C. § 393 (1970) and 25 CFR131.12(a) referred to, supra.

The Judge issued findings and a recommended decision on October 28, 1975, affirming the Acting Area Director's decision for the reason that the leases were assigned contrary to a certain Federal Statute and Departmental Regulation referred to, supra, in that the appellants did not obtain the written consent of each lessor to such assignments and did not obtain the approval of the Superintendent, Crow Indian Agency, of such assignments. (Underscoring supplied.)

We hold that the preponderance of the evidence in the record supports the findings and recommended decision of the Administrative Law Judge. We adopt Judge Elge's decision hereto attached.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1 (2), the appeal is hereby DISMISSED and the decision of the Acting Area Director is AFFIRMED.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Mitchell J. Sabagh
Administrative Judge

I concur:

//original signed
Alexander H. Wilson
Chief Administrative Judge

Attachment



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
ADMINISTRATIVE LAW JUDGE
c/o BUREAU OF INDIAN AFFAIRS
BILLINGS, MONTANA 59101

ADMINISTRATIVE APPEAL OF)	
W. J. B. GRAHAM AND WILLIAM S.)	
GRAHAM)	Docket No. IBIA 74-43-A
)	
v.)	
)	FINDINGS AND
AREA DIRECTOR, BIA, BILLINGS)	RECOMMENDED DECISION
AND ALL OTHER INTERESTED)	
PARTIES)	

1. By memorandum of January 23, 1975, from Hon. L. K. Luoma, Chief Administrative Law Judge, Office of Hearings and Appeals, Arlington, Virginia, the undersigned was designated to hold a hearing and submit a recommended decision to the Board of Indian Appeals, in accordance with an order therefor issued on January 22, 1975, by Hon. David J. McKee, the then Chief Administrative Judge of said Board.

The Chief Administrative Judge defined the issues as:

Did the appellant render the leases subject to cancellation by subleasing, assigning, amending, or encumbrancing said leases or other action contrary to the statute and regulations?

Did the parties to said leases acquiesce to the sublease assignment, amendment, or encumbrance of such leases by accepting lease payments from persons other than the appellant lessee or by any other action?

2. A prehearing conference was held in this matter on April 3, 1975, whereat it was disclosed that appellants would propose to introduce 21 exhibits and the respondent (Bureau of Indian Affairs), three. The

documents were marked for identification as A-1 through A-21 and as R-1 through R-3. It was agreed by counsel for the respective parties that, prior to the taking of testimony, a stipulation could be prepared and entered into with respect to facts not in dispute and with respect to admission of exhibits.

3. A hearing was duly held at the Crow Indian Agency, Crow Agency, Montana, on May 21, 1975. Messrs. W. J. B. Graham and William S. Graham, hereinafter referred to as the appellants, were present in person and by counsel, Messrs. Bert W. Kronmiller and James E. Seykora, of Hardin, Montana. Mr. Gary M. Murphy, Administrator of the Estate of Maurice D. Murphy, Deceased, was present in person and by counsel, Messrs. John M. Dietrich and Richard E. McCann of Billings, Montana. The Superintendent, Crow Indian Agency, and the Area Director, Billings Area Office, Bureau of Indian Affairs, were represented by Edward L. Meredith, Esq., of the Office of Field Solicitor, U. S. Department of the Interior, Billings, Montana. Also in attendance were some members of the Lefthand family: Frederick Lefthand, Anthony Lefthand, Melvin Lefthand, and Ira Lefthand. Frederick Lefthand, the prime mover in this matter, acted as spokesman for the Lefthands.

4. The undated Stipulation, prepared pursuant to the understanding at the prehearing conference, was executed by the parties at the May 21, 1975, hearing. Said stipulation is attached to the hearing transcript.

FACTS AND DISCUSSION

5. On Saturday, October 13, 1973, the appellants held a public auction at the ranch premises for the purpose of selling most of their personal property. The display advertisement thereof, published in the Hardin, Montana, newspaper on October 4, 1973, contained the statement, "OLD TIME RANCH HAS BEEN SOLD. THREE GENERATIONS OF ACCUMULATIONS WILL BE SOLD AT AUCTION." Exhibit R-3.

6. Fred Lefthand talked with Mr. W. J. B. Graham the morning of the auction, with respect to which Fred stated: ". . . At that time he indicated to me that he was leaving, that all he put in to that operation in Wyola, it took him seventy years, seventy and some odd years, and that his son was going to New Zealand, and that he was just leaving, and I told him that, I gave him my best regards and I said it was nice knowing him. I wished him luck and that was the extent of our conversation at that point."

7. In their ranching operations, the appellants had leased land from the Lefthands who were the beneficial owners of fractional shares in several allotments. Since the leases were of inherited trust lands owned by more than five competent heirs, they were subject to approval by the Superintendent, Crow Indian Agency representing the Secretary of the Interior, as provided in 25 CFR 131.15, last sentence.

Leases between the appellants and the Lefthands, involved in this case are:

Contract No. 0-115 for a period of five years beginning with October 1, 1972, covering 104 acres, more or less, of Crow allotment 1270 - Medicinetail;

Contract No. 0-116 for the same period as that in No. 0-115, covering 139.2 acres, more or less, of Crow Allotment 1277 - Pretty Woman;

Contract No. 0-347 for a period of five years beginning with December 1, 1973, covering 308.65 acres, more or less, of portions of Crow allotments 1270 - Medicinetail Lefthand, and 1273 - Peter Lefthand; and

Contract No. 0-368 for the same period as that in No. 0-347, covering 640 acres, more or less, of portions of Crow allotments 2837 - Henry Lefthand, 2838 - Fay Lefthand, and 3332 - Rena Lefthand.

8. All of the leases were couched for direct payment of cash rental to “the heirs” of the respective original Allottees, in this case, the Lefthands.

9. In each lease it is recited that the contract is made and entered into in accordance with the provisions of existing law and the regulations (25 CFR 131) “which by this reference are made a part hereof . . .” It is provided in 25 CFR 131.12(a) that a sublease, assignment, amendment, or encumbrance of any lease or permit issued under Part 131 may be made only with the approval of the Secretary and the written consent of all parties to such lease or permit, including the surety or sureties. The rule was spelled out in each lease as item 6. SUBLEASES

AND ASSIGNMENTS, under the heading "This lease is subject to the following provisions."

10. On July 10, 1973, a contract for deed was entered into by the appellants as sellers and Lalon Fladager and Daryl Fladager, as purchasers; the next day, July 11, 1973, the Fladagers by an agreement assigned their interests in and to said contract for deed to Maurice D. Murphy of Scobey, Montana. Par. 2 of stipulation. Copy of said documents were admitted into evidence as Exhibit A-20. The Graham-Fladager contract for deed is attached to the Fladager-Murphy agreement as EXHIBIT "A". Indian leases, including those with the Lefthands, were clearly a part of the consideration for the purchase price set forth in said contract for deed. The third paragraph and the pertinent portion of the fourth paragraph thereof read:

The sellers hereby agree to assign to the Purchaser all of the right, title and interest in and to the competent and non-competent leases of Indian allotted lands which are described in Exhibit "B", hereto annexed, and by reference hereby made a part of this Contract for Deed.

Said Purchaser, in consideration of the premises, hereby agrees to pay said Sellers, as and for the purchase price of said lands and premises and for the assignment of said Indian leases the amount of . . .

The last page of said EXHIBIT "B" contains the allotment numbers, the legal descriptions, and the acreages covered by Contracts 0-115, 0-116, 0-347, and 0-368 above outlined.

11. On page 6 of said contract for deed, it was provided:

Notwithstanding any other provisions of this Contract for Deed, the Purchaser shall be entitled to the possession of the lands and premises herein sold and the lands and premises herein leased on November 1, 1973.

Maurice D. Murphy first delivered livestock to the ranch premises, including the land covered by said leases, on or about November 1, 1973. Par. 4 of stipulation; last par., page 7, Appellant's Brief.

12. Maurice D. Murphy died on December 7, 1973. On December 20, a special administrator of his estate was appointed and was authorized to continue the ranching operations of the deceased; on January 17 the special administrator was appointed Administrator with the Will Annexed; that administrator was removed or resigned and on May 14, 1974, Gary M. Murphy was appointed Successor Administrator with the Will Annexed. From the time of the death of his father, Gary M. Murphy has been in possession and control of the leased premises.

13. Varying numbers of payments in varying amounts were accepted from the Maurice D. Murphy lease account by members of the Lefthand family. Exhibits A-2, A-4, A-6, A-8, A-11. The earliest thereof was dated August 28, 1973; the latest, June 3, 1974. Exhibit A-2. Fred T. Lefthand accepted and cashed one check in the amount of \$90, issued on November 20, 1973, by W. T. Shaw, Jr., agent for the Maurice D. Murphy lease account. Exhibit A-6.

14. At the May 21, 1975, hearing, counsel for Gary Murphy, Administrator of the Maurice D. Murphy Estate, cross-examined Fred

Lefthand concerning his acceptance of the \$90 check. The record thereof is (tr. 57):

Q. What you are saying now is that in November of 1973 when you accepted the \$90 check on the Maurice D. Murphy Lease Account, you were doing so to establish the foundation for this lawsuit.

A. That's right.

Q. Did you notify Mr. Graham or Mr. Murphy immediately with regard to the acceptance of that check, or Mr. Shaw?

A. After I received the check, my brother Anthony and I in December, we proceeded to Mr. Murphy's residence in Wyola. I think at that time if the approach was mutual coming from him, I think we would have considered, we would have considered something that would alleviate the problem. We had a cool reception that day and it automatically turned things off. So at that point we had, we didn't want to have any relationship with Mr. Murphy at that time.

15. On December 26, 1973, Fred Lefthand addressed a letter to the Superintendent, Crow Agency, requesting that the Graham leases be canceled. Fred stated therein that, in October, Mr. (W.J.B.) Graham sold his entire operation and vacated the area; that subsequently the Graham operation was purchased by Maurice Murphy of Scobey, Montana; that Mr. Murphy died suddenly "about two weeks ago"; that he (Fred) had made several attempts through the Crow Agency Branch of Realty to put the new owner on notice to comply with the lease assignment provision contained in the original lease contracts; and that he and the other heirs had not given their consent for the lease to continue "to a fourth party, a son of the late Maurice Murphy by the name of Gary Murphy." The

letter, as well as one dated December 27, 1973, from Fred Lefthand to the Superintendent, is in the record in the file labeled CONTR. 0-115.

16. On January 9, 1974, an unsigned letter was sent to the appellants by the Acting Superintendent, Crow Indian Agency, advising appellants that a written complaint had been filed with him stating that the appellants had sold or assigned the contracts involved in this case; calling appellants' attention to, and quoting the provisions of, item 6, SUBLEASES AND ASSIGNMENTS as contained in each lease. The letter concluded with:

Inasmuch as you have not filed assignments as stipulated above, you have violated the terms of the contracts.

In accordance with the provisions of the Code of Federal Regulations, Title 25, part 131.14, you are hereby allowed ten days from the date of receipt of this notice to show cause why your leases should not be cancelled.

17. By letter of January 14, 1974, to the Superintendent, the appellants, among other things, stated:

. . . This is to advise you that we have not sub-leased, assigned or amended the leases referred to in the letter of January 9, 1974. In the event any leases are assigned we will, of course, present the matter of the assignment to the lessors named in the leases for their consent and approval and request the approval of the Superintendent of the Crow Indian Agency.

18. The Superintendent responded to the appellants on January 8, 1974, that

Your letter stating that you did not sell or assign the contracts is not a satisfactory reply to our ten day show cause notice. In accordance with the provisions of the Code of

Federal Regulations, Title 25, 131.14, you are notified that the contracts as listed are hereby cancelled.

He further advised the appellants of their right to appeal his decision.

19. On February 12, 1974, the appellants filed a petition for review of the Superintendent's decision of January 28, 1974. The petition was directed to the Billings Area Director, Bureau of Indian Affairs. In the petition, the appellants alleged that the Superintendent's action was arbitrary and capricious because it was apparently initiated solely on the basis of Frederick Lefthand's unverified letter of December 26, 1973; that, in sending the show cause letter of January 9, 1974, the Acting Superintendent acted solely on the Lefthand letter and assumed that there had been executed a written sublease, assignment, or amendment of such leases; that notwithstanding appellants' denial contained in their January 14, 1974, letter, appellants were not offered or afforded a hearing. The appellants then reiterated that no sublease, assignment, or amendment of the lease contracts had been made by them to any third parties. For further details, see EXHIBIT D to appellants' Petition for Appeal to the Commissioner of Indian Affairs.

20. By letter of April 2, 1974, to appellants' attorney, Bert W. Kronmiller, Esq., the then Acting Assistant Area Director, Billings Area Office, Bureau of Indian Affairs, John R. White, concurred in the decision of the Superintendent, Crow Indian Agency, and denied the appeal. He advised appellants of their right to appeal his decision to the Commissioner of Indian Affairs.

21. The appellants filed a timely petition for appeal to the Commissioner of Indian Affairs. The appeal was referred to the Board of Indian Appeals for decision. The Board issued a Notice of Docketing on June 4, 1974. Frederick Lefthand filed an answer to the petition for appeal wherein the collateral issue of whether the leases had been altered to provide for 5-year terms instead of 2 or 3-year terms was raised.

22. After the appellants filed a supplemental brief, countering Frederick Lefthand's answer to the petition, the matter was referred to the undersigned administrative law judge as hereinabove stated. Par. 1, supra.

23 . Under the facts recited in paragraphs 10 and 11 hereof, an implied assignment of the lease was effected. The contractual obligation to assign the leases and the assumption of possession, use, and control of the leased premises by the late Maurice D. Murphy constitute such assignment. Absent restrictions in the leases and the regulations as set forth in paragraph 9 hereof, such implied assignments would have been effective to form the basis for the running of covenants in the leases as to burden or benefit the assignee. 49 Am Jur. 2d, Landlord and Tenant, § 397 (1970). See also Abbott v. Bob's U-Drive, 222 Or 147; 352 P.2d 598, 81 ALR 2d 793, containing the above cited rule and, further, holding that the occupation of leased premises by one other than the lessee and his payment of rent are sufficient to take the implied

assignment out of the statute of frauds. Such assignment was contrary both to the regulations, promulgated by the Secretary of the Interior pursuant to statutory authority, 25 CFR Part 131 (1974), and the provisions of said leases. See paragraph 9 hereof. Statutory authority for said regulations are cited to Part 131 at page 185 of Title 25, Code of Federal Regulations (1974).

24. The appellants claimed that the lessors acquiesced to the sublease, assignment, amendment, or encumbrance of the leases in that “numerous Lessors received, accepted and cashed lease rental checks drawn on the Maurice D. Murphy Lease Account . . .” and that at the time of Maurice D. Murphy's death, December 7, 1973, “The Lessors had already approved of Murphy's presence by accepting money (lease payments) from Murphy.” See appellants' brief page 8. Such payments were made and accepted as outlined in paragraph 13 hereof. Most of the Lefthands acquiesced in the Murphy operation by acceptance of checks.

25. Frederick Lefthand accepted one check on November 20, 1973. He and his brother thereafter called upon Mr. Gary Murphy. Whatever transpired among the parties, Frederick Lefthand and his brother wanted no further dealings with Mr. Murphy. See paragraph 14 hereof. The general rule is that acceptance of rental by a lessor from an assignee of a lease constitutes acceptance thereof or acquiescence therein, but before such acquiescence can be imputed to the lessor, he is entitled to know under what arrangements one other than the original lessee is in

possession. In this case, that a contract for deed had been entered into between the Grahams and the Fladagers and that such contract for deed had been assigned by the Fladagers to the late Maurice D. Murphy remained a carefully guarded secret until the appellants filed their petition to appeal the matter to the Commissioner. The contention that Frederick Lefthand acquiesced in the assignment of the leases by the acceptance and the cashing of one check, in light of the facts considered as a whole, cannot be sustained. This conclusion is supported by the holding of the Board of Indian Appeals in the Administrative Appeal of Sessions, Inc., v. Richard Amado Miguel (Lessor) 4 IBIA 84, 82 I.D. 331, that acceptance of rentals by a lessor subsequent to default on specific provisions of a lease by the lessee does not constitute waiver of items in default in the absence of a showing that the lessor voluntarily or intentionally waived the requirements under the lease.

26. Appellants contend that the set of circumstances reveals that a rapid series of events transpired that prevented Maurice D. Murphy and the Maurice D. Murphy Estate from successfully taking steps that are considered appropriate under the regulations to receive proper documentation of his use of the leases in question, recounting Murphy's entry into possession about November 1, 1973, the untimely death of Mr. Maurice D. Murphy, the difficulties of setting up a large cattle

operation during the fall and winter months, the difficulty of tracking down lessors, and the complications of handling such matters in the Maurice D. Murphy Estate proceedings. But what of the months before the death of Maurice D. Murphy? The transactions whereby Murphy acquired possession and control of the leased lands were completed on July 11, 1973. Negotiations prior thereto had to have been completed some time before that. Whatever, for the Murphys to be lawfully in possession of the trust lands here involved, the appellants should have obtained the written consent of each of the lessors for an assignment of the leases to Maurice D. Murphy and the approval of the Superintendent, Crow Indian Agency, of such assignments.

27. In addition to the foregoing, the appellants cite custom and usage on the Crow Reservation to sustain their position: That for many years, it has been the practice "that insofar as office leases are concerned where there are numerous Indian lessors, heirship problems involved, . . . the purchaser simply continues to make payments under the office leases and to demonstrate that the consent of the Indians is in fact given by such acceptance." The testimony that such a practice exists is uncontroverted. Tr. 75. Corroborative of the practice is a bill for collection dated 12/20/73 from the Bureau of Indian Affairs, Crow Indian Agency, addressed to Gary Murphy, Wyola, Montana, for farming and grazing rentals due on Contracts #0-2901, #0-347, and #0-368.

A xerox copy of the billing was attached to Frederick Lefthand's letter of December 27, 1973, to the Acting Superintendent, filed in the folder labeled CONTR. 0-115. The unauthorized practice does not validate the assignments for the reason that no Agency practice can abrogate Acts of Congress and regulations of the Secretary of the Interior promulgated under those Acts. See 25 U.S.C. § 393, and the regulations discussed in paragraph 9 hereof. In Sessions, Inc., v. Morton, 348 F. Supp. 694 (C.D.Cal. 1972), the Court commented on lack of action on the part of the Bureau of Indian Affairs, in connection with breaches of contract, as follows:

. . . The delays of the Department of Interior through its Bureau of Indian Affairs, . . . raise serious questions of concern for Indian affairs which cannot be adequately answered within the framework of this litigation. The Department is charged with the responsibility of the management of its trust obligations in the best interest of Indian beneficiaries. This fiduciary duty carries with it--if not express--at least an implied requirement of diligence. The tripartite nature of Indian affairs--at least in the context of this case--points up the wisdom of review of these activities to assure that the exercise of these responsibilities remains sensitive to the desires and more importantly to the needs of those our laws have been enacted to protect.

The comments apply equally to the Agency with respect to the practice at Crow Agency with respect to leases included in contracts for deeds.

CONCLUSIONS

1. The appellants rendered the leases subject to cancellation by assigning them, contrary to the statutes and regulations, in that they

did not obtain the written consent of each lessor to such assignments and they did not obtain the approval of the Superintendent, Crow Indian Agency, of such assignments.

2. Some of the lessors acquiesced in the transfer of possession of the property by accepting lease payments from persons other than the appellants-lessees. Frederick Lefthand and his brother Anthony Lefthand did not so acquiesce.

3. The collateral issue with respect to whether the leases should have provided 2 and 3-year terms instead of 5-year terms is moot in light of conclusions 1 and 2.

RECOMMENDATION

It is recommended that the decision issued by Acting Assistant Area Director John R. White, Billings Area Office, Bureau of Indian Affairs, be affirmed and that Lease Contracts 0-115, 0-116, 0-347, and 0-368 be deemed canceled as of January 28, 1974, the date of the letter from the Superintendent, Crow Indian Agency, to the appellants, notifying them of cancellation of said leases.

Done at Browning, Montana, October 28, 1975.

//original signed
Frances C. Elge
Administrative Law Judge